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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 709

CLARENCE ROGERS and
FRANK ROGERS, - - - - - - Petitioners,

versus

E. T. HOLLOWAY, MARVIN NETHERLY, NORMAN FRANKLIN, E. B. JEWELL, R. B. WALKER and D. C. CASEY, Magistrates of Spencer County, Kentucky,
A. D. FOREMAN, County Judge, and
AVERY ROGERS, County Road Engineer of Said County, - - - - - - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. _____

CLARENCE ROGERS and
FRANK ROGERS, - - - - - - - - *Petitioners,*

v.

E. T. HOLLOWAY, MARVIN NETHERLY,
NORMAN FRANKLIN, E. B. JEWELL,
R. B. WALKER and D. C. CASEY,
Magistrates of Spencer County,
Kentucky,
A. D. FOREMAN, County Judge, and
AVERY ROGERS, County Road Engineer
of Said County, - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Petitioners pray that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky.

OPINIONS BELOW.

The opinion and judgment of the Court of Appeals of Kentucky is printed in the Appendix hereto (App. 23). It is reported in 316 S. W. 2d 352.

The opinion and judgment of the Spencer County Circuit Court of Kentucky, is printed in the Appendix hereto (App. 25) and is unreported.

JURISDICTION.

The judgment of the Court of Appeals of Kentucky was entered on November 1, 1957 (App. 23). Petition for Rehearing was overruled by the same Court on October 24, 1958 (R. 231). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTION PRESENTED.

Was there a denial of due process and equal protection of law under the 14th Amendment to the Federal Constitution when Spencer County of Kentucky took petitioners' reversionary real property for public use without first following eminent domain proceedings established by Kentucky Constitution and Statutes and rested its claim to the real property on unsupported equitable estoppel, thereby avoiding payment of just compensation for the real property and damages caused by the taking?

STATUTES INVOLVED.

U. S. Constitution.

SEC. 1, AMENDMENT 14, U. S. Constitution. "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Constitution.

§ 13. "* * * nor shall any man's property be taken or applied to public use without the consent of his representatives and without just compensation being previously made to him."

§ 242. "JUST COMPENSATION TO BE MADE IN CONDEMNING PRIVATE PROPERTY; RIGHT OF APPEAL; JURY TRIAL. Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

Kentucky Revised Statutes.

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KRS 416.110 (App. 36)

STATEMENT OF THE CASE.

The Court's attention is first invited to the two exhibits which are attached, No. 1, a diagram of the locality concerned (App. 39), and No. 2, an aerial photograph of part of the same area (App. 40). These exhibits also accompanied the Petition for Rehearing (R. 231), and are subject to the same qualifications as stated immediately under Paragraph II therein. They are reincorporated in this Petition for this Court's convenience in reference as much of the case depends on the local geography involved.

I. Facts Giving Rise to the Dispute.

The petitioners, Clarence and Frank Rogers, are the owners of valuable farms in Spencer County, Kentucky. For years, prior to 1952, the Louisville & Nashville Railroad Company (hereinafter called "the Railroad"), operated a line along a right of way running generally north to south from Yoder Station to Taylorsville, passing alongside farms of the petitioners.

In May, 1952, the Railroad abandoned this line for all purposes, and it is conceded by everyone, and so held by the Appellate Court (App. 23), that when this abandonment occurred, the fee simple title to the Railroad right of way reverted to the present adjoining owners. The portion of the right-of-way in dispute in this action is that part between point "A" and point "B" on the diagram, and is marked in red pencil on both Exhibit No. 1 and Exhibit No. 2.

Everett Thomas, an appellant below, and Lloyd Prevallet and Thompson Duvall, owners of nearby farms on the Yoder Station Road realized that the abandonment of the railroad presented an opportunity to acquire the railroad bridge near the city limits of Taylorsville, thus making it possible for them to avoid the then existing necessity of fording Brashear's Creek, which crosses the Yoder Station Road at the city limits of Taylorsville, in order to go from their farms to Taylorsville (see Exhibit No. 1).

These three men were solely interested in seeing that the railroad bridge along with that portion of the right of way between Taylorsville and point "B" (not including any portion involved in this petition) be made available for public use as a roadway.

To that end, and after negotiations with the Railroad and with officials of Spencer County, these men put up $3,500.00 for which the Railroad made a Quit Claim Deed conveying two bridges and the right of way to Spencer County, and Spencer County, in turn, had agreed to convey to these three men the railroad bridge (R. 89-91).

Spencer County refused to abide by the agreement it had made (R. 91), and in return for receiving back part of their money (only $400.00 each), the three men concerned agreed to leave the right of way in the County's name (R. 99).

Respondents claim that this change was agreed to voluntarily by all concerned (R. 115, Q. 8), but respondents' claim that the money refunded to Everett Thomas was to buy out his interest in the right of way

adjoining his farm (rather than just the bridge) is not supported by any clear testimony.

Mr. Thomas, on the other hand, believed that the road would run from Taylorsville to the Farm Passway (point "B"), east along the Farm Passway to point "D" on Yoder Station Road, and north along Yoder Station Road to Yoder Station (R. 93, Q. 30), and this route would not affect in any way his ownership of that part of the right of way which lies between points "A" and "B" on the sketch of the portion in dispute in this case. There is no question involved, nor has there ever been, as to the portion of right of way between points "B" and "C".

Following the deed from the Railroad to Spencer County, the ties were removed from the old roadbed by various persons. They seem to have been given to whomever would haul them away (R. 119, Q. 30). Spencer County then proceeded to grade down the old cinder railroad bed from Taylorsville to Yoder Station until it was usable as a road, and the public began to use it (R. 128, Q. 4). Referring to Exhibit No. 1, this route is from point "C" to "B", "A" and "E".

The Rogers brothers and Everett Thomas gave notice of their ownership to Mr. Holloway, their elected representative on the Spencer County Fiscal Court (R. 47, Q. 33).

To forestall controversy, the strip designated "Farm Passway" on Exhibit No. 1, was conveyed to Spencer County, removing any objection on the part of Spencer County to the use of the alternate route through points "C", "B", "D", and "E".

Spencer County continued to use the portion of the right of way belonging to the Rogers' and Thomas. For a short period of time, the State of Kentucky assumed responsibility for the right of way from point "E" to "A", "B", "C", to Taylorsville as a rural highway (R. 149, Q. 5). Spencer County went right ahead in defiance of petitioners' rights, but the Kentucky State Highway Department halted its plans as soon as it became aware of the dispute (R. 149, Q. 8).

During this period, the Rogers and Thomas had consulted legal counsel, Mr. James C. Bright. After several months and before this action had been filed, Mr. Bright closed his office and it was necessary for appellants to start fresh with new counsel (R. 70, Q. 167).

This action was filed March 10, 1955.

Highway 55 is a high-grade, State-maintained road running into Taylorsville from the north. From Taylorsville to Yoder Station by way of this road and the intersecting Yoder Lane is about five miles. About a mile east of Highway 55 ran the old railroad right of way which parallels Highway 55, generally. From Yoder Station, traveling along the abandoned right of way, and again, roughly parallel to Highway 55, and the right of way, runs the Yoder Station Road. The farm passway runs generally east and west between points "D" and "B" and connects the Yoder Road with the Railroad right of way at the southeast corner of Clarence and Frank Rogers' farm. The present condition of the abandoned Railroad right of way is that the tracks and ties have been removed and the

remaining cinder roadbed has been graded down to form a cinder road about eight or ten feet wide at practically no expense to the public. The Yoder Station Road is a hard-surface road and is passable, but it is infrequently traveled except by Everett Thomas, Lloyd Prevallet, and Thompson Duvall, the persons who own farms on it. It is in good condition between Everett Thomas' house and Taylorsville, and in poor condition north of Everett Thomas' house to Yoder Station.

From Yoder Station to Taylorsville, a short cut is provided by either the abandoned right of way or the old Yoder Station Road. The distance of either is very nearly the same. Neither is necessary for the people living at Yoder Station. The portion of the right of way claimed by petitioners does not cut the road and forbid access to the balance of the Yoder Road lying beyond.

Whether or not the abandoned right of way is used, it will still be necessary for Everett Thomas, Lloyd Prevallet, and Thompson Duvall to continue to use that portion of the old Yoder Station Road, giving access to their property. This road has not been closed and abandoned. It is open and in use.

II. Facts as to Petitioners' Interests Involved.

The value of the right of way itself, which is in dispute in this case, as real estate, is negligible. But it is the key to an ingenious system of drainage by which Clarence and Frank Rogers have reclaimed what was formerly swamp-land, and turned it into a valu-

able farm. On the east side of the Railroad right of way, opposite the property of Mr. Rogers, is a steep hillside. The Railroad right of way is an embankment sloping off on either side from the roadbed like any typical railroad. The west boundary of the right of way is virtually a sheer drop, averaging about 15 feet along the Rogers' property. The Rogers' farm, as a result of the system of drainage tiles and ponds which they have installed at much labor and expense (R. 168, Q. 25), is now fertile, productive bottom land, generally level in contour.

The Rogers brothers, at great expense, drained the swamp-land with a system of drainage tiles and made provision for the large quantities of water which would be diverted onto their land through the culverts when rain would fall, by constructing a pond (clearly visible on Exhibit No. 2) around the spot where each culvert emptied onto their farm. Mr. Rogers explained the operation of this system of ponds and drain tiles (R. 53, 54, beg. Q. 65):

> "Q. 69. And as the ponds would fill up, would the water then drain out of the tile?
>
> A. We put a tile in each of the ponds, however, it didn't take all of the water out—it left—it would leave a little for stock water in the bottom, but we had it where there was a grass spillway and maybe a little bit run over, but after so much water got in that pond, why it would go out into a tile, and then have to raise on up a number of feet before any would run out on the field at all.

Q. 70. Then by your arrangement of the ponds, and the drainage to and from those ponds, it eliminated the water running across your land?

A. It kept us from having any washing to amount to anything."

And summarizing in Question 73 (R. 54):

"Then would the water drain from the steep east hillside, onto your ponds and then drain out to your tile system?

A. That's right."

It is obvious from the foregoing, that the key to this drainage system which has made it possible to turn a wasteland into a productive farm, is the ditch along the east side of the Railroad right of way. If this ditch is allowed to fill or become obstructed, as Spencer County has done since it wrongfully took possession of the right of way, then the water does not drain through the culverts into the ponds constructed by Mr. Rogers. Instead, the water breaks over the Railroad right of way in a number of places resulting in washing and erosion of Mr. Rogers' farmland. As Mr. Rogers states (R. 55):

"Q. 75. Were the ditches maintained?

A. No, sir.

Q. 76. What happened to the ditches?

A. Well, wasn't no ditches there, the water ran across the road most any place.

Q. 77. Well, did Spencer County, through their employees, fill up those ditches with their machinery?

A. Well, if they constructed the road they did, all the construction that I saw was just this material that the railroad used between the ties and under the ties over to the hill.

Q. 78. In other words, did they level that off to the extent that there were no ditches remaining there when they got through?

A. Some places there would be just a little that didn't come all the way along.

* * * * * * *

Q. 84. Well, how does that water now come across onto that property?

A. Well, just wherever it wants to, anywhere."

This will be a continuing source of damage, and eventually the years of effort and substantial expense which the Rogers have put into reclaiming this land will be wasted away. Mr. Rogers' claim for damages in the amount of $2,000.00 was merely the damage which had been done in the two years imediately preceding the filing of the action (R. 58):

"Q. 92. You feel, Mr. Rogers, that by reason of this water standing and running across your property, that the value of your land along that railroad has decreased, to the extent of $2,000.00?

A. I would say it has, and if the ditches are not maintained and we are not permitted to continue to use that drainage system, and use the railroad as a form of a terrace, as it has served as, we will be damaged much more than that."

This action does not involve the negligible value of a right of way. It involves the value of a fertile

farm, which is being reduced to the swamp-land which it once was.

The purpose of Clarence and Frank Rogers in this action, therefore, is to have restored to them a vital part of the drainage system of their farm and to be made whole for mounting damages caused by the illegal taking.

THE FEDERAL QUESTION.

Petitioners contend the trial Court considered and decided the Federal Constitutional aspects for that Court narrowed the questions to but one by stating at page 3 of its opinion (App. 27):

> "It is therefore, the opinion of the Court that there is only one question to be considered in this case and that is one of estoppel."

The Constitutional question was specifically presented on appeal in the appellants' original and reply briefs, and in Section XII of the Petition for Rehearing (R. 231). The Response to the Petition for Rehearing (R. 217-224) clearly indicates that both the Federal and State constitutional questions were known by all for the then appellees state (R. 223) therein, quoting from appellants' Petition and appellees' Answer:

> "SPENCER COUNTY HAS VIOLATED THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY BY TAKING APPELLANT'S PROPERTY

WITHOUT PREVIOUSLY MAKING JUST COMPENSATION.

"We have no comment to make on this section."

Obviously, appellees were unable to make any defense to the issue as raised by appellants (petitioners here).

It is equally apparent the Kentucky Court of Appeals considered and decided the Constitutional question involved for the nature of the action affects a fundamental right of the citizen and it is hardly possible an Appellate Court could have rendered a decision here without considering the Constitutional question. This Court may imply facts for jurisdiction from the record. *Murray* v. *Charleston,* 96 U. S. 432, 24 L. Ed. 760. It also has jurisdiction if the question was considered and decided. *Consolidated Turnpike Co.* v. *Norfolk,* 57 L. Ed. 857.

Petitioners further contend that raising the Federal question on Rehearing was timely in itself for the decision of the Appellate Court put to rest the question of title to the Railroad right of way having reverted to petitioners. This provided an unanticipated basis for raising the question then. *Great Northern* v. *Sunburst Oil and Refining,* 53 S. Ct. 145, 287 U. S. 358, 77 L. Ed. 360.

Also, jurisdiction of this Court extends to examination of proceedings had in a State Court under State authority for the appropriation of private property for public purposes. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 17 S. Ct. 581, 166 U. S. 226, 41 L. Ed. 979.

REASONS FOR GRANTING THE WRIT.

1. Power of Eminent Domain Conceded Upon Strict Exercise of the Power.

It is now elementary that eminent domain is a right of sovereignty which is not dependent upon constitutional authority. It may therefore be said this power is an attribute of proper government which may take private property for public use and of the necessity or expediency for the taking the government must be the judge.

This power of eminent domain, however, is to be strictly construed in its exercise for it is in effect the abridgement, although necessary, of a basic right of the people—the right of enjoying private property without undue interference.

2. Compensable Title to the Real Property Had Reverted to the Petitioners.

By the decision of the Court of Appeals of Kentucky herein (App. 23) and the weight of law (44 Am. Jur., "Railroads", Sec. 110, pp. 323-24) upon abandonment the portion of the right of way involved reverted to the petitioners as successors in title of the original grantors to the Railroad. Compensation in eminent domain acquisitions is payable to the present title holder. *Danforth* v. *United States,* 60 S. Ct. 231, 308 U. S. 271, 84 L. Ed. 240; *Roberts* v. *Northern Pacific R. R.,* 15 S. Ct. 756, 158 U. S. 1, 39 L. Ed. 873; *Kindred* v. *Union Pacific R. Co.,* 32 S. Ct. 780, 225 U. S. 582, 56 L. Ed. 1216.

3. Estoppel Should Not Be the Basis for Acquisition Here.

Spencer County contended that petitioners were estopped to deny a dedication of all of the abandoned right of way because of their act in dedicating a passway to Spencer County. The right of way marked "Farm Passway" was already in existence and would provide a means of access to the bridge. When Clarence and Frank Rogers joined with the other persons having a right to use the farm passway, and dedicated it to Spencer County, it was for the purpose of giving the residents of Yoder Station access to the railroad bridge from point "E" along Yoder Station Road to point "D", along the farm passway to point "B", and from point "B" to Taylorsville, thus avoiding any need for the public to use that portion of the right of way adjoining the Rogers' property in order to have access to the bridge. *Far from being evidence of dedicating that portion of the right of way between points "A" and "B" to public use, the granting of this passway to Spencer County negatives any such intention on their part.* The record is void of any other affirmative action on petitioners' part, which could conceivably be considered an act of dedication.

Also, Clarence Rogers gave timely notice to Spencer County that he was the owner of the property which they proposed to use as a road (R. 47, Q. 33). In fact, all parties below were advised of their own rights and of the claims of the other parties from the beginning, with the sole exception of Everett Thomas, who was

the victim of the breach of faith on the part of the Fiscal Court of Spencer County when they failed to carry out their agreement to convey the bridge to him and Lloyd Prevallet and Thompson Duvall (R. 91). Further, no question of estoppel is involved in favor of either party in the dispute against the other, because two essential elements of estoppel, namely, (1) a misrepresentation of a material fact, (2) upon which the other party relied, are not present.

As stated in 19 Am. Jur. 634, Estoppel, Section 34:

> "Equitable estoppel, or estoppel *in pais*, is the principle by which a party who knows, or should know the truth is absolutely precluded, both at law and in equity from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed."

4. Spencer County Has Violated the Federal Constitution by This Taking.

Petitioners here contend that when Spencer County, Kentucky, through its Fiscal Court acted in the manner it did to acquire, without compensation to petitioners, the abandoned Railroad right of way adjacent to their real property, it violated the 14th Amendment

to the Federal Constitution by taking the property without due process of law and denying petitioners the equal protection of the law.

Kentucky, by Section 13 and Section 242 of its Constitution (page 3, *supra*) has defined the limitation on the exercise of the power of eminent domain in its Commonwealth. It has delegated this power specifically for road purposes to its counties by statutes, KRS 178.110, KRS 178.115, KRS 178.120, KRS 416.100 and KRS 416.110 (App. 31).

It should follow then that the exercise of this power by other than the statutory procedure, intended as it is to insure Constitutional safeguards, denied petitioners their rightful Constitutional protection. This Court said in *Appleby* v. *Buffalo,* 221 U. S. 532, 55 L. Ed. 842:

> "That the 14th Amendment of the Federal Constitution forbids a state to deprive any person of property for public use without due process of law and to take private property for public use without compensation amounts to such deprivation is recognized and affirmed in a case wherein the subject was given much consideration. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581:
>
> " 'Due Process of law as applied to judicial proceedings constituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner

> even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'"

And furthermore:

> "'In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state, or under its direction, for public use without compensation made or secured to the owner is, upon principle and authority, wanting in due process of law required by the 14th Amendment of the Constitution of the U. S., and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.'"

The question of what amounts to due process of law in cases of this character was also before this Court in the case of *Backus* v. *Fort St. Union Depot*, 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853. In summing up the essentials of due process of law in condemnation cases there, this Court said:

> "All that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation and when this has been provided there is that due process of law which is required by the Federal Constitution."

Existence of due process is the province of this Court. *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Del Castillo* v. *McConnico*, 168 U. S. 674,

18 S. Ct. 229, 42 L. Ed. 622; *Baltimore Traction Co.* v. *Baltimore Belt R. Co.*, 14 S. Ct. 294, 151 K. S. 137, 38 L. Ed. 102; *Marchant* v. *Pitts. R. R. Co.*, 14 S. Ct. 894, 153 U. S. 380, 38 L. Ed. 751; *Pittsburgh* v. *Backus*, 14 S. Ct. 1114, 154 U. S. 421, 38 L. Ed. 1037; *Kentucky R. Tax Cases*, 6 S. Ct. 57, 115 U. S. 321, 29 L. Ed. 414.

The term "due process of law" refers to the States' own process. *Re Mahon*, 34 Fed. 525.

The State has full control over procedure in its courts subject to the qualification that such proceedings must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Maxwell* v. *Dow*, 20 S. Ct. 448, 176 U. S. 581, 44 L. Ed. 597.

In the present case, however, we find government having taken the private propery of petitioners without the merest form of the usual and ordinary proceedings in eminent domain, and without compensation. Such action is akin to that proscribed in *Roberts v. City of N. Y.*, 55 S. Ct. 689, 295 U. S. 264, 79 Fed. 1429, in which this Court said:

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

Or that in *McGovern* v. *New York*, 33 S. Ct. 876, 229 U. S. 373, 57 L. Ed. 1232, in which this Court said that due process is lacking if "plain rights" have been ignored.

CONCLUSION.

Spencer County must not be permitted to seize possession of an abandoned railroad right of way, under cover of a quit claim conveyance, and thereafter hold it behind a screen of contrived acts of estoppel against the right of the true owners of the reversion. If the County needs this property, it should be required to pay just compensation as required by the Federal Constitution and Kentucky's Constitution and its statutes. This Court has said such compensation, either paid or secured, is a prerequisite when private property is to be taken for public use. *Chicago, B. & Q. R .Co., supra,* page 17.

The action of Spencer County is also disturbing because it takes the burden off government in the taking and places it on the property owner, saying to him, "We have your land, now you get it back or make us pay for it if you can". In the light of the great basic principles of the Constitution concerned and the weight of law, this is diametrically opposed to what is envisioned when government wants private property. More fitting is the Constitutional method that would require Spencer County to first say, "We need your property. What will it cost us?"

Spencer County has run roughshod over the Constitutional rights of Clarence and Frank Rogers, and their local courts have acquiesced in Spencer County's action.

This Petition is their last resort. This Court has power to fully and completely right the wrong which has been done these two men.

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS OF KENTUCKY

CLARENCE ROGERS, ET AL., - - - - - *Appellants,*

v.

E. T. HOLLOWAY, INDIVIDUALLY, ET AL., - - *Appellees.*

PER CURIAM.

Motion by plaintiffs below for an appeal from a judgment of the Spencer Circuit Court, Hon. Coleman Wright, Judge, dismissing their action against the fiscal court of Spencer County, in which the plaintiffs had sought to recover possession of a tract of land being used as a county road, and damages to their adjoining land resulting from alleged improper maintenance of ditches along the road causing water to be diverted onto plaintiffs' land. The movants also claim an appeal as a matter of right.

The complaint sought damages in the amount of $2,300, and recovery of the land, which was part of an abandoned railroad right of way. The value of the land is not determinable from the pleadings and the judgment. Accordingly, the amount in controversy is not shown to be as much as $2,500, with the result that there is no appeal as a matter of right. KRS 21.070, 21.080; McLean v. Thurman, Ky., 273 S. W. 2d 825; Mullins v. Hall, Ky., 273 S. W. 2d 831; Stokes v. Henderson, Ky., 276 S. W. 2d 12; Hall v. Ferguson, Ky., 288 S. W. 2d 628.

We think the evidence warranted a conclusion that the plaintiffs, who acquired ownership of the abandoned right of way by reversion, intended to dedicate it as a public

road, from Taylorsville to Yoder Station, and the county accepted the dedication. The plaintiff Thomas was a prime mover in the establishment of the road, contributing a substantial sum of money and receiving a partial reimbursement from the people of Yoder Station, and the plaintiffs Rogers brothers joined in the proposal by deeding a passway. It is reasonably clear that the Rogers brothers fully understood that the road was to run all the way from Taylorsville to Yoder Station.

Having dedicated the right of way, the plaintiffs could not claim damages for the alleged wrongful taking of the right of way.

We find no error in the finding of the trial court with respect to the alleged damage from water diversion.

The motion for an appeal is overruled and the judgment is affirmed.

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SPENCER CIRCUIT COURT

CLARENCE ROGERS, ET ALS., - - - - *Plaintiffs,*

v.

E. T. HOLLOWAY, ET ALS., - - - - *Defendants.*

FINDINGS OF FACT AND OPINION.

The above-styled action having been submitted to the Court upon the pleadings, exhibits and proof on this November 22, 1955, and the Court having considered said pleadings, exhibits and proof, and after hearing the agruments of Counsel for all of the parties, makes the following findings of fact, to-wit:

1. That just after November 6, 1952 Spencer County took over the bridge and right-of-way formerly occupied by the Louisville and Nashville Railroad Company and maintained and worked on same as a public highway and is now occupying same as a public roadway.

2. On June 2, 1953, the Louisville and Nashville Railroad Company executed and delivered to Spencer County, Kentucky a quitclaim deed for the bridge in dispute and the right-of-way from Yoder's Station to Taylorsville, Kentucky, for the consideration of Three Thousand Five Hundred ($3,500.00) Dollars which Three Thousand Five Hundred ($3,500.00) Dollars was contributed to the County by Lloyd Prevallet, Thompson Duvall and one of the plaintiffs, Everett Thomas (See Defendants' Exhibit "2").

3. On June 30, 1953, Spencer County paid the said Lloyd Prevallet, Thompson Duvall and Everett Thomas the sum of One Hundred ($100.00) Dollars each and the further sum of Three Hundred ($300.00) Dollars each from a special fund paid in by Edward Englin, Cotton and others who lived at and beyond Yoder's Station, and whose only route to Taylorsville was by Highway #55. (See Defendants' Exhibit "3").

4. On July 3, 1954, the plaintiffs, Clarence Rogers, Frank Rogers and his wife, Thompson Duvall and wife and Lloyd Prevallet and wife deeded to Spencer County, Kentucky, a right-of-way 990 feet long and 30 feet wide from the Taylorsville-Yoder's Station road to the L. & N. right-of-way about 1200 feet north of the bridge discussed in the evidence for the consideration of the benefits to be derived by the parties making use of the public road described in said deed. This road was made a part of the County road system by order of the Fiscal Court dated March 9, 1954. (See Defendants' Exhibit "4").

5. On April 13, 1954, the L. & N. right-of-way from Taylorsville to Yoder's Station and thence to #55 a distance of 3.5 miles was designated a rural highway and the proof shows that the State Road Department spent at least One Thousand ($1,000.00) Dollars repairing same prior to the institution of the instant action and without objection or interference from any of the plaintiffs or any other person.

6. All of the plaintiffs knew about the quitclaim deed from the railroad company to Spencer County, Kentucky, and each of them saw the County graders, trucks and men working on the right-of-way shortly after November 6, 1952, until the instant case was filed on March 10, 1955, but made no attempt to stop same by Court orders or otherwise. No attempt was made by any of the plaintiffs or any

other person to interfere with the public using said roadway.

7. The proceedings of the Fiscal Court were open to all persons and no objection was made prior to March 10, 1955, when suit was instituted, to question any one of the several Court orders with respect to the acquisition, opening and maintenance of the railroad right-of-way as a public highway.

8. Considerable money had been spent on the acquisition, operating and maintenance of said road by Spencer County and taxpayers who had no other purpose in mind but a road from Yoders to Taylorsville, none of which money would have been spent if plaintiffs had timely and properly objected.

9. The question of the railroad ties was a matter of first come first served.

10. The evidence is nil as to the County having filled the ditches in question. It can be only supposed that in grading the road the ditches were affected. Also it can be assumed that when road was used as a detour the ditches then became clogged, if they did so.

It is, therefore, the opinion of the Court that there is only one question to be considered in this case and that is one of estoppel. Are the plaintiffs now estopped from asserting any reversionary interest they had in the L. & N. right-of-way?

The law recognizes equitable estoppel which "rests largely on the facts and circumstances of each particular case." It differs from a legal estoppel in that "it arises out of the acts and conduct of the party estopped and not from a record or deed." American Jurisprudence Secs. 34 and 35. "It is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice." American Jurisprudence Sec. 42. No consideration,

agreement or legal obligation is necessary to support an equitable estoppel.

Also the doctrine of estoppel extends to the real and personal estate and it has been held that title to realty may pass by an equitable estoppel where justice requires such action. See Jones vs Travis, 194 S. W. 2d., 841, 302 Ky. 367. The Court held many years ago a person may be divested of title to land by estoppel. Trimble vs King, 114 S. W. 317, 131 Ky. 1. "It is a plain principle that if one having a right and seeing another about to invade it stands by in such a way as to induce the one doing the act to believe that he consents to the invasion of that right, when otherwise such person might have refrained from doing so, he is estopped from complaining of it." Fischer vs James A. Diskin Co., 57 S. W. 2d, 538, 247 Ky., 694.

All three of the plaintiffs knew the County had received a quitclaim deed at the time it was executed and had prior to that time seen the County working and repairing the right-of-way. In addition legal counsel had been consulted many months prior to instituting suit and even one of the plaintiffs, Thomas, had put up money and received back money from the Fiscal Court and persons whom he knew was putting up same so they could use the entire right-of-way instead of the 1200 feet and bridge. The Fiscal Court, considering all of the plaintiffs' actions and conduct, repaired said right-of-way at great expense and opened up considerable territory and made same easily accessible to the County seat, Taylorsville.

Therefore, the two essentials of an estoppel were established: (1) Acts by one party (the plaintiffs) that would estop him (them); and (2) the other party has been misled by such acts to their detriment. Fordson Coal Co. vs Garrard, 125 S. W. 2d 977, 277 Ky. 218.

This is not an action for damages for taking of another's land for public use but for a recovery of the land itself.

The Court is of the opinion that should plaintiffs deem they are damaged as a result of the taking then they have their action for damages allowed by the law for such taking. See City of Whitesburg vs Lewis, 72 S. W. 2d 1019, 255 Ky. 91.

The parties are directed to enter judgment herein consistent with the findings of fact and this opinion.

This November 26, 1955.

Judge, Spencer Circuit Court.

SPENCER CIRCUIT COURT

CLARENCE ROGERS, ET ALS., - - - - - *Plaintiffs,*

v.

E. T. HOLLOWAY, ET ALS., - - - - - *Defendants.*

JUDGMENT.

The Court, having considered the pleadings, exhibits, proof, argument of counsel in the above-styled action, and all parties being before Court and represented by Counsel, and the Court having filed herein his Findings of Fact and Opinion, it is now the judgment of the Court that the plaintiffs' petition and amended petition be, and same are, hereby dismissed and plaintiffs shall recover nothing thereby from the defendants.

It is further the judgment of the Court that the defendants recover of the plaintiffs herein their costs expended, for which execution may issue after ten (10) days.

This November 26, 1955.

Judge, Spencer Circuit Court.

178.110 [4302] **Condemnation of right of way; temporary roads.** (1) If the court decides to establish or alter a county road, bridge or landing, and the compensation to be paid for the right of way cannot be fixed by agreement, the right of way shall be condemned under the procedure set forth in KRS 416.100.

(2) In case of roadbeds or bridges, or a portion of them, washing or slipping away, or in case of extreme emergency, and when in its judgment conditions warrant it, the county court may immediately open and have surveyed a road or passway to be temporarily used while the commissioners appointed under KRS 416.100 are acting, or while the matter is pending in the court to establish a permanent road or passway, and the commissioners shall assess the damages of the temporary road or use thereof. The same proceedings shall be had to recover damages as in recovery in regard to other roads.

(3) But when such compensation is ascertained it shall be at the option of the county court to pay it or to abandon the proposed undertaking. If it decides to pay the compensation, the fiscal court of the county shall include in its next levy an amount sufficient therefor.

(4) Not more than two acres shall be condemned for a landing.

178.115 Power of fiscal court to open, establish or alter road; procedure; appeal. (1) Whenever the fiscal court of any county deems it to be in the best interest of such county to open, establish or alter the location of any public road, street, alley, ditch, culvert, bridge or similar public way or structure in such county, said fiscal court shall adopt a resolution setting forth the necessity for such public road

or-structure, and thereupon such public road or structure shall be deemed opened, established or altered, as the case may be, on bhalf of the county. A certified copy of said resolution or order shall be posted at the courthouse door of the county within five days after its adoption and a certified copy of said resolution shall be posted by the county road engineer of the county along or at the proposed road or structure within five days after its adoption.

(2) In all cases where such public roads or structures have been established, any person or persons aggrieved thereby may prosecute an appeal from such order or resolution of the fiscal court by filing a petition in equity in the circuit court of the county setting forth his grievance, to which petition shall be attached an attested or certified copy of such order or resolution. Such petition shall be filed within thirty-five days from the date such order or resolution was entered. Such appeal shall be heard and decided by the court without the intervention of a jury. Any party so appealing shall execute and file a bond for costs at the time such appeal is taken. An appeal to the Court of Appeals will lie from the judgment of the circuit court if taken within sixty days after the ate of the entry of the judgment in the circuit court. (19 c. 128, §§ 1, 2)

178.120 [4302a-2] **Condemnation of land by fiscal court.** Whenever the fiscal court of any county deems it to be in the best interest of the county to open, establish, construct, alter, or repair any public road, street, alley, ditch or bridge of the county and the fiscal court is unable to contract with the owner of the land, required for such purpose, for its purchase or to acquire the same by gift, the land may be condemned under the procedure set forth in KRS 416.110.

416.020 [835; 836] **Appointment of commissioners; evaluation of property; commissioners' report.** Upon a petition

being filed as provided in KRS 416.010, the court shall appoint as commissioners three impartial housekeepers of the county who are owners of land. They shall be sworn to faithfully and impartially discharge their duties under this section. The commissioners shall view the land and material, and award to the owner the value of the land and material taken, which shall be stated separately. They shall also award any incidental damages resulting to the adjacent lands of the owner, considering the purposes for which it is taken, but shall deduct from the incidental damages the value, if any, of the advantages and benefits that will accrue to the adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a written report to the office of the county clerk, stating their award, and shall describe in their report the land and material condemned, giving the name of each owner and stating whether he is a nonresident of the state or under any disability.

416.030 [837] **Process issued when report filed.** Upon the application of the company, and upon the filing of any necessary affidavits, the clerk of the court shall issue process against the owner to show cause why the report should not be confirmed, and shall make such orders as to nonresidents and persons under disability as are required by the Civil Code in actions against them in the circuit court.

416.040 [838] **Confirmation of report as to parties not excepting.** At the first regular term of the county court after the owner has been summoned ten days, if the summons be served in the county, or if served outside the county twenty days, or if the service is constructive thirty days, the court shall examine the report, and if it appears to be in conformity to the provisions of KRS 416.020, the court shall confirm the report as against any party not excepting thereto, or to the extent that no exceptions have been filed. (1952, c. 84, §66; effective July 1, 1953)

416.050 [839] **Trial of exceptions; judgment.** When exceptions are filed by either party, the court shall forthwith cause a jury to be impaneled to try the issues of fact made by the exceptions. Each juror shall be allowed one dollar per day for his services, to be taxed as costs. In assessing the damages the jury shall be governed by the rule prescribed in KRS 416.020. Upon the request of either party, the jury may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause is not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed.

416.060 [839; 840] **Appeal to circuit court.** Either party may, within thirty days, appeal to the circuit court from the judgment of the county court entered under KRS 416.050. The appeal shall be taken by executing bond as required in other cases and by filing with the clerk of the circuit court a statement of the parties to the appeal and a transcript of the orders of the county court. Upon the same being filed the clerk of the circuit court shall certify to the clerk of the county court that the appeal has been filed, and the clerk of the county court shall immediately transfer the original papers to the clerk of the circuit court. The appeal shall be tried de novo. If the owner on his appeal fails in the circuit court to increase the amount of damages awarded in the county court, he shall pay all the costs of the appeal; if the damages are increased in the circuit court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the company seeking to condemn the land.

416.070 [839] **Transfer of case to circuit court when title to land is involved.** In all cases where there are

conflicting claimants to the land condemned, and where all such claimants are before the county court in the condemnation proceedings, the condemnor, after the damages have been assessed in the county court, may by motion have the case transferred to the circuit court of the county in which the condemnation proceedings are pending, for the purpose of having the rights of respective claimants in the land determined. Upon filing the order of transfer in the office of the clerk of the circuit court, the condemnor may pay the damages assessed in the county court to the master commissioner of the circuit court, to be held by him for the benefit of, and paid over to, such of the claimants as the circuit court, or the Court of Appeals, on appeals, determines are entitled thereto. The condemnor, upon making the payment to the commissioner, may immediately take possession of the land condemned in the same way as if payment had been made directly to the owners as provided by KRS 416.080. The circuit court clerk shall docket a case so transferred as other civil cases are docketed, and the case shall thereafter proceed between the conflicting claimants to trial and judgment as if the action had originated between them in the circuit court. The transfer of any condemnation case as provided in this section shall in no way affect the right of any party to the condemnation proceeding to appeal to the circuit court and thence to the Court of Appeals, as authorized by KRS 416.060.

416.080 [839] **When company entitled to possession of condemned property.** Upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by the court as provided in KRS 416.040 and 416.050, and the payment to the owners of the amount due, as shown by the report of the commissioners as confirmed, or as shown by the judgment of the county court, and all costs adjudged to the owner, the railroad company shall be entitled to take possession of the land and material,

and to use and control it for the purpose for which it was condemned as fully as if the title had been conveyed to the company. When an appeal is taken from the judgment of the county court by the company, it shall be entitled to take possession of the condemned property after it has paid into court the damages assessed and all costs. All money paid into court under the provisions of this section shall be received by the clerk of the court and held subject to the order of the court, for which the clerk and his sureties on his official bond shall be responsible to the persons entitled thereto.

416.100 [4302] **Condemnation by county court for road purposes.** (1) When any county court desires to condemn land under the authority of KRS 178.110, the county court shall appoint three impartial housekeepers of the county as commissioners to assess the damages the owner or tenant may be entitled to receive. The commissioners shall be sworn to faithfully and impartially discharge their duties according to law.

(2) Either the county or any tenant or owner may file exceptions to the report of the commissioners. If exceptions are filed by either party, the court shall, unless the parties waive a jury, forthwith cause a jury to be impaneled to try the issues and to assess compensation and damages.

416.110 [4302a-2 to 4302a-12] **Condemnation by fiscal court for road purposes; alternative method.** (1) When any fiscal court desires to condemn land under the authority of KRS 178.120, it shall adopt a resolution ordering the condemnation of the required land. The resolution shall set forth the facts contemplated by KRS 178.120, give a general description of the land, and the name of the owner if known, and shall direct the county attorney to institute the proceedings.

(2) The county attorney shall file the petition for condemnation in the county court in the name of the county, and shall attach to the petition as an exhibit a certified copy of the resolution of the fiscal court. The resolution shall be prima facie evidence of the public use and necessity for the condemnation. Thereafter the proceedings shall be as provided in KRS 416.020 to 416.080, with the following exceptions:

(a) The "value of the land," as used in KRS 416.020, shall be the market value thereof, including the value of any trees or shrubbery taken and the market replacement value of fencing similar to any taken, and in the commissioners' report each of these items shall be stated separately, in addition to stating separately the incidental damages to adjacent land.

(b) The trial on exceptions shall be held on a day fixed by the court, rather than forthwith.

(c) The jury shall not be sent to view the land until after all testimony has been submitted to it.

(d) If the county appeals to the circuit court, it need not file a supersedeas bond.

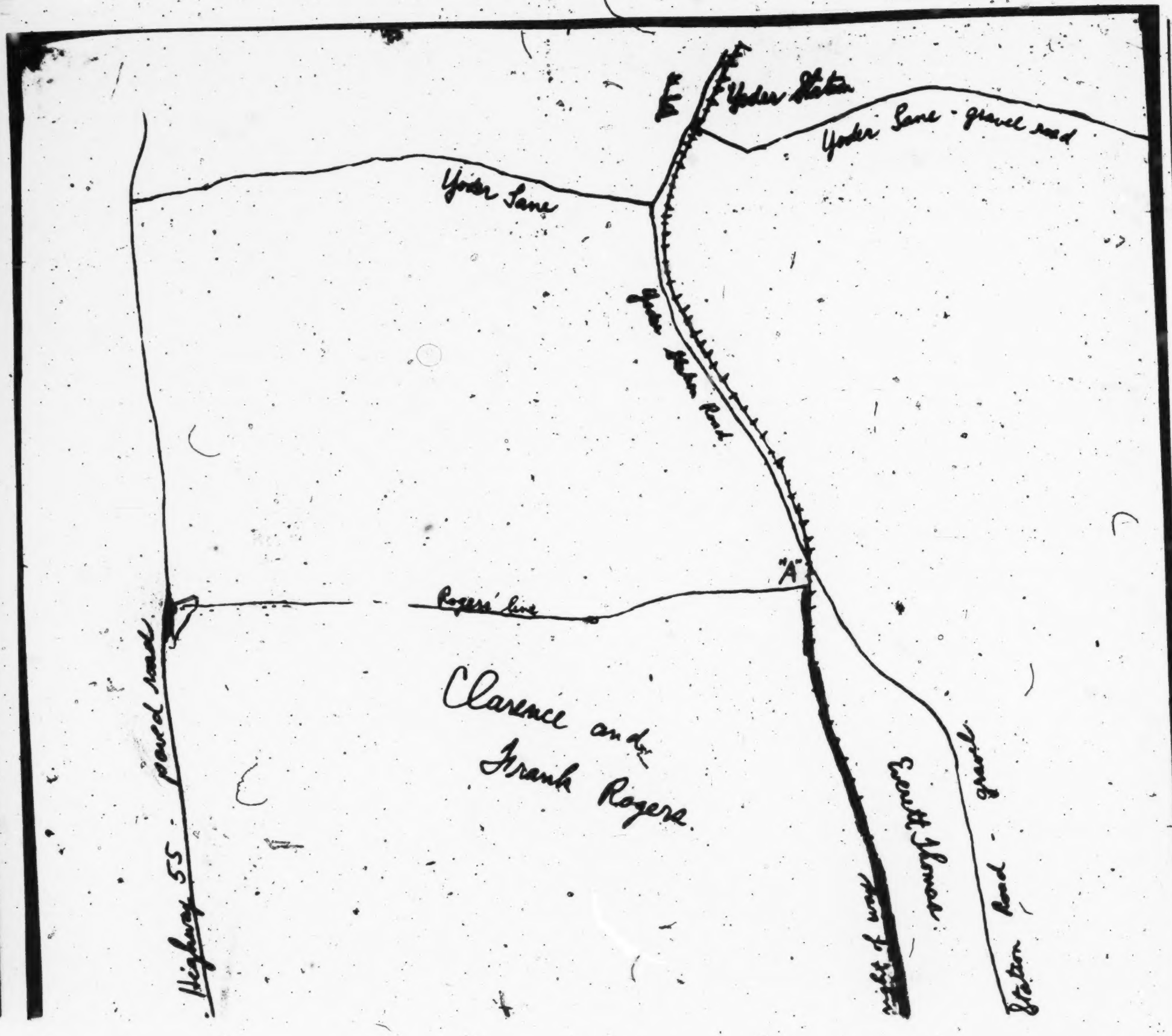
(e) On appeal to the circuit court, a certified copy of the judgment of the county court shall be filed in lieu of a transcript of the orders of the county court.

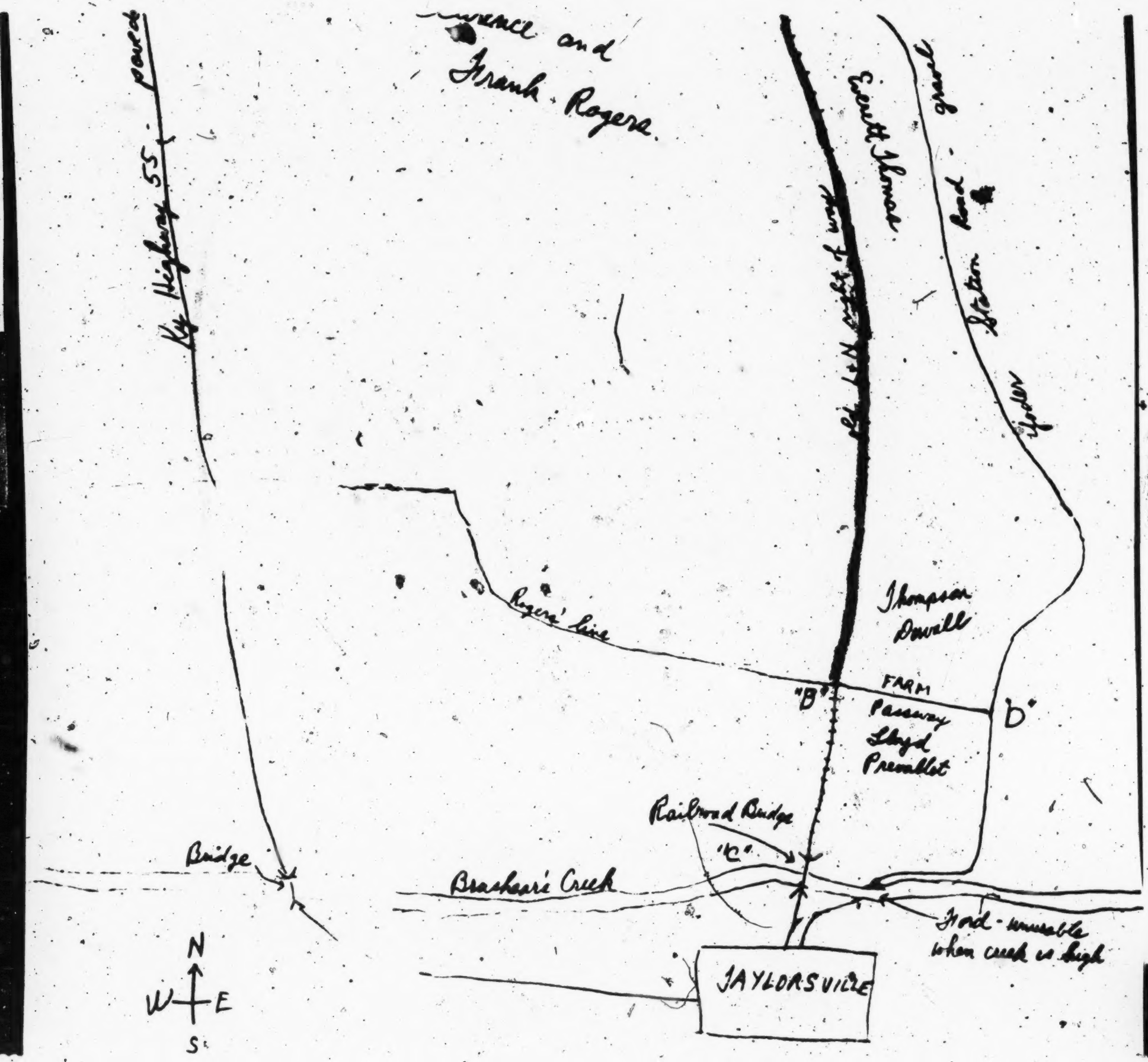
(f) If, on appeal by the owner, the award of damages is not increased, or if, on appeal by the county, the award of damages is reduced, the owner shall, in addition to paying the costs of the appeal, repay to the county any sum he has received in excess of the amount awarded to him by the circuit court, plus interest at six percent on the difference between the awards from the date of the county court judgment, whether or not he has received the same. If, on appeal by the owner, the award of damages is increased, or if, on appeal by the county, the award is not reduced, the

county shall, in addition to the costs of the appeal, pay interest at the rate of six percent on the difference between the awards.

(g) The county shall be entitled to take possession of the land condemned and to use and control the land for the purpose for which it was condemned, as fully as if title had been coveyed to the county, upon paying to the owner the damages awarded by the commissioners' report, where the report is confirmed, or paying into court the damages awarded by the jury, together with all costs adjudged to the owner.

(3) This section and KRS 178.120 constitute an additional and alternative method for the instutition and prosecution of condemnation proceedings to acquire right of ways for county roads, streets alleys, ditches and bridges.


Yoder Station
Yoder Lane - gravel road
Yoder Lane
Yoder Station Road
"A"
Rogers' Line
Highway 55 - paved road
Clarence and Frank Rogers
East Thomas
Station Road - gravel


Ky Highway 55 - paved
Rogers' line
Thompson Dowell
FARM
Pasaway
Lloyd
Premallet
"B"
"D"
Railroad Bridge
"C"
Bridge
Brashears Creek
Ford - unusable when creek is high
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